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 Auburn Lake Trails Property Owners Association

UNITED STATES BANKRUPTCY COURT
 EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO

IN RE DANIEL MAJOR EDSTROM

Debtor,

DANIEL MAJOR EDSTROM

Plaintiff,

v.

AUBURN LAKE TRAILS PROPERTY
 OWNERS ASSOCIATION, a California non-
 profit mutual benefit corporation; et al.

Defendants.

Case No.: 12-29353-B-11

Chapter 11

Adv. Proc. No.: 13-02132-B

Docket Control No. ATL-1

**NOTICE OF MOTION TO DISMISS FOR
 FAILURE TO STATE A CLAIM, OR IN
 THE ALTERNATIVE FOR A MORE
 DEFINITE STATEMENT**

Hearing date: July 23, 2013

Time: 9:32 a.m.

Courtroom: 32

Department: B

Hon. Thomas C. Holman

PLEASE TAKE NOTICE that on July 23, 2013, at 9:32 a.m., or as soon thereafter as the matter may be heard, in Courtroom 32, of the above entitled Court located at 501 I Street, 6th Floor, Sacramento, CA, before the Honorable Thomas C. Holman, Defendant, Auburn Lake Trails Property Owners Association (the "Association") will move this Court for an Order dismissing the Complaint, or in the alternative for a more definite statement.

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1 If Plaintiff-Debtor opposes the Association's motion, such opposition shall be in writing
 2 and shall be served and filed with the court by the responding party at least fourteen (14) days
 3 preceding the date or continued date of the hearing. The Association's counsel Bradley J.
 4 Epstein and Susana C. Cendejas with the law firm of Angius & Terry LLP, must be served with
 5 any opposition at Angius & Terry LLP, 3001 Lava Ridge Court, Suite 130, Roseville, CA
 6 95661.

7 Failure to file timely written opposition may result in the motion being resolved without
 8 oral argument and the striking of untimely written opposition.

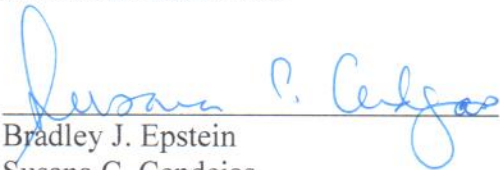
9 Tentative rulings, dispositions without oral argument, matters resolved without oral
 10 argument, and matters continued for evidentiary hearings are posted prior to the scheduled
 11 hearing on the Court's Internet site, www.caeb.uscourts.gov, at the "Pre-hearing Dispositions"
 12 link. Parties appearing by telephone must download and review all pre-hearing dispositions
 13 before the hearing. Failure to do so may result in the imposition of sanctions, including taking
 14 the matter as submitted without oral argument or continuing the hearing.

15 This motion is based on the this Notice of Hearing, the accompanying Motion and
 16 Memorandum of Points & Authorities, the pleadings, papers and records on file in this action,
 17 and such oral argument as may be presented at the time of the hearing.

18
 19 Dated: May 17, 2013

ANGIUS & TERRY LLP

20
 21 By:


 22 Bradley J. Epstein
 23 Susana C. Cendejas
 24 Attorneys for Defendant,
 25 Auburn Lake Trails Property
 26 Owners Association
 27
 28

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Auburn Lake Trails Property Owners Association
7

8 UNITED STATES BANKRUPTCY COURT
9 EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO
10

11 IN RE DANIEL MAJOR EDSTROM

12 Debtor,

13 DANIEL MAJOR EDSTROM

14 Plaintiff,

15 v.

16 AUBURN LAKE TRAILS PROPERTY
17 OWNERS ASSOCIATION, a California non-
18 profit mutual benefit corporation; et al.

19 Defendants.
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) Case No.: 12-29353-B-11

) Chapter 11

) Adv. Proc. No.: 13-02132-B

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) **MEMORANDUM OF POINTS &
) AUTHORITIES IN SUPPORT OF
) DEFENDANT AUBURN LAKE TRAILS
) PROPERTY OWNERS ASSOCIATION'S
) MOTION TO DISMISS FOR FAILURE
) TO STATE A CLAIM, OR IN THE
) ALTERNATIVE FOR A MORE
) DEFINITE STATEMENT**

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21 Hon. Thomas C. Holman
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MEMORANDUM OF POINTS & AUTHORITIES**I. INTRODUCTION**

On April 18, 2013, Plaintiff-Debtor filed an adversary complaint against Defendants Auburn Lake Trails Property Owners Association (the "Association"), Allied Trustee Services ("Allied"), and G&P Enterprises, LLC ("G&P"), (collectively referred to herein as "Defendants"). In Plaintiff-Debtor's rambling and conclusory seventy-eight (78) page complaint, he alleges twenty-one (21) causes of action Defendants.

No lien has been filed against Plaintiff-Debtor by any Defendants. The Association is an unsecured creditor whose debt will most likely be discharged in the bankruptcy proceeding. The complaint does not qualify as an adversary proceeding and fails to state any claim upon which relief can be granted. Plaintiff-Debtor's complaint is so vague and ambiguous, that the Association cannot reasonably prepare a response.

The Association requests that the Court dismiss the complaint because it is not an adversary proceeding and for failure to state a claim; or in the alternative require Plaintiff to provide a more definite statement.

II. RELEVANT FACTS & PROCEDURAL HISTORY

The Association is a homeowners association formed to manage the affairs and common area, including assessment collection of the Auburn Lake Trails development. Through about January 2012 to the present, Plaintiff-Debtor failed to pay Association's monthly assessments of \$169.00 per month. (See Itemized Statement as of 04/17/12, attached as Exhibit 6 to Complaint).

Before any further collection action could be taken and before any lien could be filed against Plaintiff-Debtor or his property, Plaintiff-Debtor filed for Chapter 11 bankruptcy on May 15, 2012. On or around May 23, 2012, the Association received notice that Plaintiff-Debtor had filed for Chapter 11 bankruptcy. (See Association's letter to Plaintiff-Debtor dated June 12, 2012, attached as Exhibit 10 to Complaint).

On or around June 8, 2013, Plaintiff-Debtor sent a letter to the Association threatening the Association with alleged collection practices violations and other alleged wrongdoings by the Association. (See Plaintiff-Debtor's letter to the Association dated June 8, 2012, attached as

Exhibit 10 to the Complaint). In his June 8th letter, Plaintiff-Debtor also specifically states, “You are once again urged to contact me at your earliest convenience so we can correct the deficiencies in the ALT collections policy.”(*Id.*)

On or around June 12, 2012, the Association responded to Plaintiff-Debtor’s letter and informed him that because of the “automatic stay” all proceedings against Plaintiff-Debtor and his property would be suspended. (See Association’s letter to Plaintiff-Debtor dated June 12, 2012, attached as Exhibit 10 to Complaint). The Association’s June 12th letter also specifically states, “We will monitor the bankruptcy and will not move forward until we receive the courts decision and the BK is closed.” (*Id.*)

On April 18, 2013, Plaintiff Debtor filed a complaint for adversary proceeding (the “Complaint”) against Defendants. A majority of Plaintiff-Debtor’s claims are not related to his bankruptcy action, they are merely attenuated state law claims that Plaintiff-Debtor is attempting to lump together with his bankruptcy action.

III. LEGAL ARGUMENT

A. THE COMPLAINT DOES NOT QUALIFY AS AN ADVERSARY PROCEEDING BECAUSE NO LIEN HAS BEEN FILED AND NO CONTENTION HAS BEEN MADE THAT THE CLAIM CANNOT BE RESOLVED THROUGH THE BANKRUPTCY ACTION

Federal Bankruptcy Rule 7001 provides which actions qualify as adversary proceedings. Pursuant to Federal Bankruptcy Rule 7001(1)-(10) any of the following qualifies as an adversary proceeding: (1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee; (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d); (3) a proceeding to obtain approval under § 363(h) for the sale of both the interest of the estate and of a co-owner in property; (4) a proceeding to object to or revoke a discharge, other than an objection to discharge under §§ 727(a)(8), (a)(9), or 1328(f); (5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan; (6) a proceeding to determine the dischargeability of a debt; (7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief; (8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination; (9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or (10) a proceeding to determine a claim or cause of action removed under 28 U.S.C. § 1452.

No lien has been filed against Plaintiff-Debtor or his property. The Association is an unsecured creditor, and the pre-petition amounts owed to the Association will most likely be discharged in the bankruptcy proceeding. The bulk of Plaintiff-Debtor's "claims" are attenuated state law claims that Plaintiff-Debtor is attempting to lump together with his bankruptcy action in order to avoid the fees and costs associated with filing a separate lawsuit against Defendants.

Plaintiff-Debtor claims that he is requesting injunctive relief to "forever" enjoin Defendants from "taking any action to perfect a lien or foreclose non-judicially on Plaintiff-Debtor's real property." (See Complaint at para. 239, lines 19-20) He further states that his request for injunctive relief is necessary because, "once outside the purview of the bankruptcy court, Plaintiff-Debtor will be unable to declare bankruptcy again and will be vulnerable to retaliation." (See Complaint at para. 239, lines 22-24). Again, there is no lien currently in place against Plaintiff-Debtor or his property. Plaintiff-Debtor is attempting to manipulate the bankruptcy process to avoid Association assessments forever, and seeking extraordinary relief for speculative "retaliation" that he perceives could be take place against him once the bankruptcy has been discharged.

Plaintiff-Debtor has not alleged any facts as to why the Association's claim would not be resolved through the Chapter 11 bankruptcy plan, or that the Association's claim has not already been subordinated as part of the Chapter 11 bankruptcy plan. The law provides that an adversary proceeding is only necessary when a creditor's claims have not already been subordinated.

Therefore, an adversary proceeding is simply not necessary to resolve Plaintiff-Debtor's claims and must be dismissed.

B. THE COMPLAINT MUST BE DISMISSED BECAUSE EACH OF PLAINTIFF'S CLAIMS FAIL AS A MATTER OF LAW

The Association seeks dismissal of the complaint pursuant to Fed. R. Civ. P. 12(b)(6), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7012.

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1 **1. Pleading Standards**

2 The following sets forth the legal standard on a motion to dismiss for failure to state a
3 claim on which relief may be granted Fed. R. Civ. P. 12(b)(6):

4 The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of
5 Civil Procedure, made applicable here under Fed. R. Bankr. P. 7012, is to test the
6 legal sufficiency of a plaintiff's claims for relief. In determining whether a
7 plaintiff has advanced potentially viable claims, the complaint is to be construed
8 in a light most favorable to the plaintiff and its allegations taken as true. *Scheuer*
v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Church of*
Scientology of Cal. v. Flynn, 744 F.2d 694, 696 (9th Cir.1984). . .

9 *Quad-Cities Constr., Inc. v. Advanta Bus. Servs. Corp. (In re Quad-Cities Constr., Inc.)*, 254
10 B.R. 459, 465 (Bankr. D. Idaho 2000).

11 A plaintiff cannot “plead the bare elements of his cause of action, affix the label ‘general
12 allegation,’ and expect his complaint to survive a motion to dismiss.” *Ashcroft v. Iqbal*, 129 S.Ct
13 1937, 1954 (2009). Instead, a complaint must set forth enough factual matter to establish
14 plausible grounds for the relief sought. See *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-66
15 (2007). (“[A] plaintiff’s obligation to provide ‘grounds’ of his ‘entitle[ment] to relief requires
16 more than labels and conclusions, and a formulaic recitation of the elements of a cause of action
17 will not do.”). Factual allegations must be enough to raise a right to relief above the speculative
18 level. *Id.*, citing to 5 C. Wright & A. Miller, *Fed. Practice and Procedure* § 1216, at 235-36 (3d
19 ed. 2004) (“[T]he pleading must contain something more. . . than . . . a statement of facts that
20 merely creates a suspicion [of] a legally cognizable right of action”).

21 A dismissal under Rule 12(b)(6) may be based on the lack of cognizable legal
22 theory or on the absence of sufficient facts alleged under a cognizable legal
23 theory. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001); *Balistreri v.*
Pacifica Police Dep’t., 901 F.2d 696, 699 (9th Cir. 1988). . . the Court is not
24 required “to accept as true allegations that are merely conclusory, unwarranted
25 deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State*
Warriors, 266 F.3d 979, 988 (9th Cir. 2001). Courts will not “assume the truth
26 of legal conclusions merely because they are cast in the form of factual
27 allegations.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th
28 Cir. 2003); accord *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).
Furthermore, courts will not assume that plaintiffs “can prove facts which [they
have] not alleged, or that the defendants have violated . . . laws in ways that have
not been alleged.” *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of*
Carpenters, 459 U.S. 519, 526; 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983). . .

Toscano v. Ameriquest Mortg. Co., 2007 U.S. Dist. LEXIS 81884 (E.D. Cal. 2007).

2. The Complaint Fails to State Any Claim Against the Association

a. The First Cause of Action Fails to State a Claim for Violation of the Automatic Stay because No Post-Petition Actions Have Been Taken Against Plaintiff-Debtor

11 U.S.C. 362 states, in relevant part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities,...

Automatic stay serves only as restraint on acts to gain possession of or control over property of estate, **but it does not create affirmative duty to remedy past acts of fraud, bias, or harassment as soon as debtor files bankruptcy petition--stay applies only to acts taken after petition is filed.** *United States v Inslaw, Inc.* (1991, App DC) 289 US App DC 383, 932 F2d 1467. [emphasis added]

In the Complaint, Plaintiff-Debtor alleges that prior to filing for bankruptcy the Association had restricted his access to Association common areas including access to certain vehicle entry gates. (See Complaint at para. 121, lines 17-20). Plaintiff-Debtor also specifically alleges that the Association had pre-petition authority to restrict access to Association common areas. (See Complaint at para. 121, lines 20-21).

Plaintiff-Debtor has not alleged any facts that support this claim that Defendants took any post-petition actions against him. In fact, it was Plaintiff-Debtor that attempted to further harass and communicate with the Association after his bankruptcy petition had been filed. The Association's response to his actions was to send him a letter specifically stating, that because of the "automatic stay" all proceedings against Plaintiff-Debtor and his property would be suspended.

Clearly, there is no violation of the automatic stay, and Plaintiff-Debtor's claim fails as a matter of law.

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b. The Second Cause of Action Fails to State a Claim for Objection and Disallowance of a Claim because His Complaint Does Not Qualify as an Adversary Proceeding

Federal Bankruptcy R 3007(b) provides:

Demand for relief requiring an adversary proceeding. A party in interest shall not include a demand for relief of a kind specified in Rule 7001 in an objection to the allowance of a claim, but may include the objection in an adversary proceeding.

Federal Bankruptcy R 7001 provides, in relevant part:

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

...

(2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d);

...

(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;

(8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;...

Fed. R. Bankr. P. 3007 provides that claim objection is not adversary proceeding if it has not been joined with demand for any of relief described in Fed. R. Bankr. P. 7001; that is, under Fed. R. Bankr. P. 3007 and Fed. R. Bankr. P. 9014, objection to claim does not give rise to adversary proceeding but to contested matter unless objection seeks relief other than disallowance of claim. *In re FV Steel & Wire Co.* (2007, BC ED Wis) 372 BR 446.

Adversary proceeding is only required for claim subordination if subordination is not provided for under Chapter 11 plan; in this case, debtors' plan provided for class of subordinated claims; therefore, adversary proceeding was not required to reach issue of claim subordination. *In re Wash. Mut., Inc.* (2011, BC DC Del) 462 BR 137, 55 BCD 252.

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1 No lien has been filed against Plaintiff-Debtor or his property. Therefore, there is no
 2 lien to challenge. Plaintiff-Debtor also claims that he is requesting injunctive relief pursuant
 3 FRBP 7001(7). However, Plaintiff-Debtor's request for injunctive relief is to "forever" enjoin
 4 the Defendants from "taking any action to perfect a lien or foreclose non-judicially on Plaintiff-
 5 Debtor's real property." (See Complaint at para. 239, lines 19-20). Again, there is no lien in
 6 place against Plaintiff-Debtor or his property and the Association is an unsecured creditor.

7 Plaintiff-Debtor has not alleged any facts as to why the Association's claim would not
 8 be resolved through the Chapter 11 bankruptcy plan or that its claim has already been
 9 subordinate as part of the Chapter 11 bankruptcy plan. The law provides that a adversary
 10 proceeding is only necessary when a creditor's claims have not already been subordinated.
 11 Therefore, an adversary proceeding is simply not necessary to resolve Plaintiff-Debtor's claims,
 12 and his Complaint must be dismissed.

13 c. The Third Cause of Action Fails to State a Claim for Breach of Contract

14 A breach of contract claim requires allegations of (1) existence of a contract, (2)
 15 plaintiff's performance or excuse for non-performance, (3) the defendant's breach and (4)
 16 plaintiff's damages. *Reichart v. General Ins. Co.* (1968), 68 Cal.2d 822, 830.

17 In Plaintiff's-Debtor's confusing and rambling claim for breach of contract, he states
 18 that the CC&Rs are a contract between him and the Association. However, nowhere does
 19 Plaintiff-Debtor state which provisions of the CC&Rs have been allegedly breached. Instead,
 20 Plaintiff-Debtor makes allegations that the Association breached the CC&Rs by: failing to take
 21 action when Allied ceased to exist in or around 2007; by ratifying an publishing an assessment
 22 collection policy; failing to protect the Association's membership by requiring Allied to
 23 maintain "adequate insurance"; by failing to maintain control over Association member's
 24 identifying information; and failing to have "appropriate controls" over "critical" operational
 25 procedures and processes. (See Complaint at para. 138).

26 The Association is unaware of any provisions of the CC&Rs which, if Plaintiff-Debtor's
 27 allegations were true, would constitute a breach of contract. The CC&Rs do provide that
 28 Plaintiff-Debtor is obligated to pay assessments when due. (See attached as Exhibit 1 to

1 Complaint, the Association's CC&Rs). Specifically, the CC&Rs at Article IV, Section 1(a)
2 provide, in relevant part:

3 Each Owner of a Lot by acceptance of a deed therefor (whether or not it shall be
4 so expressed in such deed), covenants and agrees, to pay to the Association the
Regular Assessments and Special Assessments hereinafter provided for...

5 California law also provides that an owner may not withhold assessments owed to the
6 association on the grounds that the owner is entitled to recover money or damages from the
7 association for some other obligation. *Park Place Estates Homeowners Assn. v. Naber* (1994)
8 29 Cal.App.4th 427.

9 Plaintiff-Debtor claims that his performance under the CC&Rs was "excused" because
10 the Association supposedly breached the CC&Rs first. (See Complaint at para. 137, lines 14-
11 17). Even if the Association had breached the CC&Rs as alleged in the Complaint, the law
12 specifically provides that Plaintiff-Debtor's failure to pay assessments is not excused.
13 Therefore, Plaintiff-Debtor's breach of contract claim fails as a matter of law.

14 d. The Fourth Cause of Action Fails to State a Claim for Specific
15 Performance because It Is a Remedy not a Cause of Action

16 A claim for specific performance is a remedy not a separate cause of action. California
17 law at Civil Code Section 3387 provides that specific performance is a remedy for breach of
18 contract:

19 It is to be presumed that the breach of an agreement to transfer real property
20 cannot be adequately relieved by pecuniary compensation. In the case of a
21 single-family dwelling which the party seeking performance intends to occupy,
22 this presumption is conclusive. In all other cases, this presumption is a
presumption affecting the burden of proof.

23 Since specific performance is a remedy not a cause of action Plaintiff-Debtor has not
24 stated a claim for specific performance.

25 e. The Fifth Cause of Action Fails to State a Claim for Violation of Fair
26 Debt Collection Practices Act

27 FDCPA was enacted in order to eliminate abusive debt collection practices by debt
28 collectors. Specifically, Federal law at 15 U.S.C. 1692(e) provides:

1 It is the purpose of this title to eliminate abusive debt collection practices by debt
2 collectors, to insure that those debt collectors who refrain from using abusive
3 debt collection practices are not competitively disadvantaged, and to promote
consistent State action to protect consumers against debt collection abuses.

4 Plaintiff-Debtor alleges that the Association is “using and impersonating Allied Trustee
5 Services, Inc. in the collection of its own debts”, and is “hiding behind this alias”. However,
6 Plaintiff-Debtor fails to state how the Association is “using and impersonating Allied Trustee
7 Services, Inc.” or how its actions can be construed as “hiding behind” an alias.

8 Plaintiff-Debtor has also failed to allege which provisions of the FDCPA were violated
9 by the Association and how. Nor does Plaintiff-Debtor state why or how the FDCPA applies to
10 the Association. Therefore, his Complaint must be dismissed.

11 f. The Sixth Cause of Action Fails to State a Claim for Violation of
12 Rosenthal Fair Debt Collection Practices Act

13 The Rosenthal Fair Debt Collection Practices Act (“Rosenthal Act”) is California’s
14 version of the Federal FDCPA. The Rosenthal Act was enacted to prohibit debt collectors from
15 engaging in unfair or deceptive acts. Specifically, California Civil Code Section 1788.1(b)
16 provides:

17 It is the purpose of this title to prohibit debt collectors from engaging in unfair or
18 deceptive acts or practices in the collection of consumer debts and to require
19 debtors to act fairly in entering into and honoring such debts, as specified in this
title.

20 Plaintiff-Debtor alleges that the “foregoing acts and omissions of the Defendant
21 constitute numerous and multiple violations of the RFDCPA.”

22 Again, Plaintiff-Debtor does not specifying which acts or omission of the Association
23 are violations of the Rosenthal Act. Nor does he state which provisions of the Rosenthal Act
24 have been violated. Plaintiff-Debtor’s claim for violation of the Rosenthal Act is so vague that
25 it is clear from the pleadings that no such cause of action can exist against the Association.

26 g. The Seventh Cause of Action Fails to State a Claim for California
27 Business & Professions Code 17200

28 California Business & Professions Code Section 17200 states:

1 As used in this chapter, unfair competition shall mean and include any unlawful,
 2 unfair or fraudulent business act or practice and unfair, deceptive, untrue or
 3 misleading advertising and any act prohibited by Chapter 1 (commencing with
 Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

4 To state a claim under California's Unfair Competition Law (UCL), a plaintiff must
 5 plead that: (1) defendant engaged in one of the practices prohibited by the statute, and (2)
 6 plaintiff suffered actual injury in fact as a result of defendant's actions; while fraud is not a
 7 necessary element of a successful UCL claim, when fraud is alleged, the heightened pleading
 8 standard applies. *Marolda v. Symantec Corp.*, N.D.Cal.2009, 672 F.Supp.2d 992. Allegations
 9 by mortgagors that mortgagee made false representations about the mortgage loan terms did not
 10 satisfy heightened pleading requirement that fraud claims be stated with particularity, and thus,
 11 did not state claim for fraud, under California law, absent allegations as to what the
 12 misrepresentations were, who made them, when and where they were made, and why
 13 mortgagors' reliance on the statements was reasonable. *Kelley v. Mortgage Electronic Regis-*
 14 *tration Systems, Inc.*, N.D.Cal.2009, 642 F.Supp.2d 1048.

15 Plaintiff-Debtor alleges that, "Defendants acts and practices are likely to deceive,
 16 constituting fraudulent business act or practice." (See Complaint at para. 156, lines 1-2).
 17 However, despite making an allegation for "fraudulent" business acts or practices, Plaintiff-
 18 Debtor has failed to satisfy the heightened pleading standard required to support an allegation
 19 for fraudulent business practices or acts. Plaintiff-Debtor fails to allege what representations
 20 where made to him, by whom, when, and where they were made. Most importantly, Plaintiff-
 21 Debtor does not allege any facts to support a claim that he reasonably relied on any statements
 22 made by Defendants.

23 Therefore, Plaintiff-Debtor's claim for violation of California Business & Professions
 24 Code 17200 fails as a matter of law, and his Complaint must be dismissed.

25 h. The Eighth Cause of Action Fails to State a Claim for Breach of
 26 Fiduciary Duty

27 Directors of nonprofit corporations such as association are fiduciaries who are required
 28 to exercise their powers in accordance with the duties imposed by the Corporations Code. This
 fiduciary relationship is governed by the statutory standard that requires directors to exercise

1 due care and undivided loyalty for the interests of the corporation. *Frances T. v. Village Green*
 2 *Owners Ass'n.* (1986) 42 Cal.3d 490.

3 In paragraph 171 of the Complaint, Plaintiff-Debtor alleges constructive fraud against
 4 the Association for failure to take certain acts with respect to co-defendant Allied. However,
 5 Plaintiff-Debtor fails to state whether those acts occurred and whether they were a breach of the
 6 Association's fiduciary duty.

7 In his typical conclusory manner, Plaintiff-Debtor also alleges that "Defendants should
 8 be disgorged of their funds that have converted to their personal use, and those funds should be
 9 returned to their rightful owners." (See Complaint at para. 172, lines 27-28). First, it is
 10 impossible to ascertain which funds Plaintiff-Debtor is referring to. Second, Plaintiff-Debtor
 11 makes a serious allegation against the Association with respect to the use of funds for its
 12 personal use without any facts whatsoever to support the claim.

13 In addition, Plaintiff-Debtor makes allegations regarding the alleged "longstanding
 14 mismanagement" of the Association, claiming that it is insolvent and incapable of self-
 15 management. He further requests that the court appoint a receiver and/or conservator to oversee
 16 the affairs of the Association. Here again, Plaintiff-Debtor provides no facts to support his
 17 allegation that the Association is being "mismanagement", or "incapable of self-management".
 18 Nor does he clearly state which acts by the Association are an alleged breach of its fiduciary
 19 duty. Therefore, Plaintiff-Debtor fails to state a claim upon which relief can be granted

20 i. The Ninth Cause of Action Fails to State a Claim for Fraudulent
 21 Misrepresentation

22 A fraud claim requires allegations of (1) misrepresentation, (2) its falsity, (3) the
 23 defendant's knowledge of its falsity, (4) the defendant's intent to induce reliance on the false
 24 statement, (5) justifiable reliance on plaintiff on the false statement, and (6) resulting damages.
 25 5 Witkin, *Summary of California law, Torts* §772 (10th Ed. 2005). In alleging fraud or mistake,
 26 a party must state with particularity the circumstances constituting fraud or mistake. Malice,
 27 intent, knowledge, and other conditions of a person's mind may be alleged generally. (FRCP
 28 Rule 9(b).

Through, Plaintiff-Debtor's ramblings of the alleged wrongs done to him by the Association there is no clear indication that he has met the stringent pleading standards for a fraudulent misrepresentation claim. He states that he was ordered to pay "Allied Trustee Services, Inc.", however, nowhere in his Complaint does he state that he in fact justifiably relied on any statement made by the Association or that he paid any sum of money to the Association or Allied. (See Complaint at para. 176, lines 12-14). Nor is it clear what damages, if any, have been suffered by Plaintiff-Debtor for allegedly fraudulent statements made by the Association.

As a matter of law, Plaintiff-Debtor has failed to establish a claim for fraudulent misrepresentation.

j. The Tenth Cause of Action Fails to State a Claim for Negligence

There are five distinct elements essential to a tort cause of action, including an action based on negligence: (1) duty on the part of defendant to use due care; (2) breach of that duty; (3) detriment to plaintiff (that is, plaintiff's loss or harm suffered in person or property); (4) plaintiff's detriment being a proximate result of defendant's breach of duty; and (5) damages (that is, the measure of the detriment in terms of money). 1-1 California Torts § 1.01

Plaintiff-Debtor alleges that the Association breached its duty to him when Allied ceased to exist. However, Plaintiff-Debtor has submitted information showing that Allied was registered and validly doing business in Placer County. (See Exhibit 4 to Complaint). When Plaintiff-Debtor failed to pay monthly assessments his case was referred to Allied, and Allied sent him a letter specifically stating that they represented the Association. (See Allied's letter to Plaintiff-Debtor dated April 17, 2013, attached as Exhibit 6 to Complaint). Plaintiff-Debtor alleges that this letter alone caused him severe emotional distress. However, Plaintiff-Debtor has failed to state what damages he has suffered as result of the Association's alleged negligence. Plaintiff-Debtor has been avoiding his Association assessment payments for well over a year, he clearly has not been damaged by any alleged negligence by the Association.

Therefore, Plaintiff-Debtor's claim for negligence fails as a matter of law.

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k. The Eleventh Cause of Action Fails to State a Claim for Slander of Title

In order to have a claim for slander of title pursuant to California law Plaintiff-Debtor must show: "Disparagement or slander of title is a publication made without a privilege or justification of matter that is untrue and is disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as a purchaser or lessee thereof might be determined thereby and that results in pecuniary loss from the impairment of vendability thus caused." (Rest. Torts, § 624, quoted in *Gudger v. Manton* (1943), 21 Cal.2d 537, 541. The burden of proof of the lack of privilege is on the plaintiff. *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 622.

Since no lien has been filed there can be no claim for slander of title.

l. The Twelfth Cause of Action Fails to State a Claim for Intentional Infliction of Emotional Distress

To state a claim for intentional infliction of emotional distress, a plaintiff must plead and prove: (a) extreme and outrageous conduct with the intention of causing, or reckless disregard for the probability of causing, emotional distress; (b) the suffering of severe or extreme emotional distress; and (c) actual proximate causation of the emotional distress by the defendant's outrageous conduct. *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903. The intentional conduct complained of must exceed "all bounds of usually tolerated by decent society, of a nature which is *especially calculated to cause*, and does cause, mental distress of a very serious kind." *Id.*, 54 Cal.3d at 904-905 (quoting *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 165). Severe emotional distress means "emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it." *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1004.

Plaintiff-Debtor's twelfth cause of action simply does not meet these pleading requirements. Instead he makes allegations unsupported by fact that Defendants incessantly harassed him both before and after he filed for bankruptcy, and that he fears for his safety and that of his family. (See the Complaint at para. 200, lines 18-19, see also para. 199, lines 8-9) He further alleges that he is "constantly worried, anxious and nervous that he will not only be

1 deprived of access to the automated bar code gates, but denied access to his property.” (See
 2 Complaint at para. 200, lines 26-28). However, he fails to state any facts which support his
 3 allegations.

4 Although a court assumes the truth of properly pled factual allegations, it need not
 5 accept as true conclusory statements, unwarranted deductions of fact, unreasonable inferences,
 6 or conclusions of law. *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 678-79.

7 While Plaintiff-Debtor’s dispute with the Association may be “stressful” he has not
 8 alleged any facts that would support a claim for intentional infliction of emotional distress.

9 m. The Thirteenth Cause of Action Fails to State a Claim for Negligent
 10 Infliction Emotional Distress

11 Unless the defendant has assumed a duty to plaintiff in which the emotional condition of
 12 the plaintiff is an object, recovery is available only if the emotional distress arises out of the
 13 defendant's breach of some other legal duty and the emotional distress is proximately caused by
 14 that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten
 15 physical injury, not simply damage to property or financial interests. *See Cooper v. Superior*
 16 *Court* (1984) 153 Cal.App.3d 1008, 1012-1013; *Quezada v. Hart* (1977) 67 Cal.App.3d 754,
 17 761-763.

18 Plaintiff-Debtor again alleges that he has suffered emotional distress at the hands of the
 19 Association. Plaintiff-Debtor states that he was “nervous” and “embarrassed” because he was
 20 denied access to the gate most conveniently located to his home. (See Complaint para. 210,
 21 lines 15-20). He further alleges that he “suffered severe agitation, nervousness...” “never
 22 knowing if he was going to be denied entry on to his own property.”(See Complaint at para.
 23 210, lines 25-28)

24 However, he states no facts of that support a claim that any action was performed by the
 25 Association to support his alleged fears and concerns, or to reasonable justify his “nervousness”
 26 and agitation. While he may have been inconvenienced and his dispute with the Association
 27 may have been stressful, he has not stated a claim for negligent infliction of emotional distress.

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n. The Fourteenth Cause of Action Fails to State a Claim for Harassment

California Code of Civil Procedure Section 527.6(b)(3) provides:

"Harassment" is unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner.

Plaintiff-Debtor has stated no facts that the Association took any acts of unlawful violence against him, or even a credible threat of violence against him. Nor has he provided any facts that would support an allegation that the Association knowingly or willfully engaged in a course of conduct that seriously alarmed, annoyed, or harassed him, that served no legitimate purpose. Any action taken by the Association was taken in attempt to obtain Plaintiff-Debtors compliance with the Association's CC&Rs, which he refused and continues to refuse to do.

Plaintiff-Debtor has not alleged any facts to support a claim for harassment by the Association.

o. The Fifteenth Cause of Action Fails to State a Claim for Good Faith and Fair Dealing

There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658.

Again, Plaintiff- Debtor makes conclusory statements regarding the Association alleged breach of contract with respect to the CC&Rs and using Allied to assist in collecting his delinquent assessments. Plaintiff-Debtor has not and cannot cite any provision of the Association's CC&Rs which support his contention that the Association's retention of Allied was a breach of contract. If there has been any breach of the good faith and fair dealing it has been Plaintiff-Debtor's adamant refusal to pay assessments as required by the CC&Rs on a flimsy excuse regarding alleged issues with Allied's business status.

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1 Plaintiff-Debtor has failed to allege sufficient facts to support a claim for breach of good
2 faith and fair dealing, and his Complaint must be dismissed.

3 p. The Sixteenth Cause of Action Fails to State a Claim for Respondeat
4 Superior

5 Civil Code section 2295 provides: "An agent is one who represents another, called the
6 principal, in dealings with third persons. Such representation is called agency." "The rule of
7 respondeat superior is familiar and simply stated: an employer is vicariously liable for the torts
8 of its employees committed within the scope of the employment. Equally well established, if
9 somewhat surprising on first encounter, is the principle that an employee's willful, malicious
10 and even criminal torts may fall within the scope of his or her employment for purposes of
11 respondeat superior, even though the employer has not authorized the employee to commit
12 crimes or intentional torts." *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12
13 Cal.4th 291, 296-297.

14 Plaintiff-Debtor attempts to make a claim for respondeat superior most likely in an
15 attempt to impute the actions of Allied and G&P onto the Association. However, Plaintiff-
16 Debot fails to provide any facts to support his claim. Instead Plaintiff-Debtor supplies evidence
17 that Allied is registered to do business in Placer County and that G&P Enterprises LLC is doing
18 business as Allied. (See Complaint's Exhibit 3) He again states that it is a "breach of contract"
19 to engage Allied, however, he cites no facts to support his claim. (See Complaint at para. 232)
20 lines 21-23). He further states that Allied's "Initial Communication" is a violation of FDCPA
21 and the Rosenthal Act but again provides no facts to support his allegation. (See Complaint at
22 para. 232, lines 26-28). Plaintiff-Debtor has failed to provide facts to show that Allied
23 performed any tortious acts against him which could be imputed to the Association.

24 Therefore, Plaintiff-Debtor's claim for respondeat superior fails and his Complaint must
25 be dismissed.

26 q. The Seventeenth Cause of Action Fails to State a Claim for Injunctive
27 Relief

28 An injunction should issue only where the intervention of a court of equity "is essential
in order effectually to protect property rights against injuries otherwise irremediable."

1 *Cavanaugh v. Looney*, 248 U. S. 453, 248 U. S. 456 (1919). The Court has repeatedly held that
 2 the basis for injunctive relief in the federal courts has always been irreparable injury and the
 3 inadequacy of legal remedies. *Rondeau v. Mosinee Paper Corp.*, 422 U. S. 49, 422 U. S. 61
 4 (1975); *Sampson v. Murray*, 415 U. S. 61, 415 U. S. 88 (1974); *Beacon Theaters, Inc. v.*
 5 *Westover*, 359 U. S. 500, 359 U. S. 506-507 (1959); *Hecht Co. v. Bowles*, supra, at 321 U. S.
 6 329.

7 Plaintiff-Debtor has not alleged any facts which support his claim for injunctive relief.
 8 He requests that the Court grant him the extraordinary remedy of injunctive relief by “forever”
 9 enjoining the Association and Allied from “taking any action to perfect a lien or foreclose non-
 10 judicially on Plaintiff-Debtors real property.” (See Complaint at para. 239, lines, 18-20).

11 Again, no lien has been filed against Plaintiff-Debtor’s property therefore there can be
 12 no irreparable injury when the Association has no lien to foreclose upon. Instead, Plaintiff-
 13 Debtor is using the bankruptcy process to avoid his obligation to the Association to pay
 14 assessments, and now seeking an order that would forever preclude the Association from
 15 collecting delinquent assessments from him.

16 Plaintiff-Debtor’s claim for injunctive relief fails as a matter of law, and his Complaint
 17 must be dismissed.

18 r. The Eighteenth Cause of Action Fails to State a Claim for Conspiracy

19 "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on
 20 persons who, although not actually committing a tort themselves, share with the immediate
 21 tortfeasors a common plan or design in its perpetration. By participation in a civil conspiracy, a
 22 co-conspirator effectively adopts as his or her own the torts of other co-conspirators within the
 23 ambit of the conspiracy. In this way, a co-conspirator incurs tort liability co-equal with the
 24 immediate tortfeasors." *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th
 25 503, 510-511.

26 Plaintiff-Debtor has not stated any facts to support a claim that any conspiracy existed
 27 between the Association and Allied. In addition, California law does not recognize conspiracy
 28 as a separate cause of action but as a measure of allocating damages among joint tort-feasors.

Therefore, Plaintiff-Debtor’s claim for conspiracy fails as a matter of law.

s. The Nineteenth Cause of Action Fails to State a Claim for Invasion of Privacy, additionally and alternatively Intrusion into Seclusion

The right of privacy has been described as "independent of the common rights of property, contract, reputation and physical integrity, ... 'the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short it is the right to be let alone.'" *Gill v. Curtis Publishing Co.* (1952) 38 Cal. 2d 273, 276.

Plaintiff-Debtor specifically acknowledges that the Association's CC&Rs and collection policy state that Plaintiff-Debtor could be denied use and enjoyment of Association common areas. (See Complaint at para. 249, lines 1-3). Plaintiff-Debtor does not dispute the validity of the CC&Rs. Regardless of whether Plaintiff-Debtor disputes the validity of the Association's collection policy, he was aware that the Association could deny him access to Association common areas for failure to pay assessments.

Plaintiff-Debtor has not alleged any facts to support a claim for invasion of privacy or intrusion into seclusion. He states that his "privacy and seclusion" were intruded upon when he was denied access to "ALT common areas". (See Complaint at para. 249, lines 8-10). However, he does not state, nor can he state that he had any reasonable expectation of privacy in "ALT common areas". In fact his description shows that the area in questions belongs to the Association.

Therefore, his claim for invasion of privacy and intrusion into seclusion fail as a matter of law.

t. The Twentieth Cause of Action Fails to State a Claim for Quiet Title

When a plaintiff failed to allege precisely what adverse interest she was seeking to quiet title against and which party held the claims asserted against her title, in keeping with CCP § 760.020(c), her failure to satisfy those requirements was fatal to her quiet title claim. *Hafiz v. Greenpoint Mortgage Funding, Inc.* (2009, ND Cal) 652 F Supp 2d 1039, 2009 US Dist LEXIS 60818.

Plaintiff-Debtor cannot state which adverse interest he is seeking to quiet title against because no lien has been filed against his property and there is no adverse interest. Therefore, his claim for quiet title fails as a matter of law, and his Complaint must be dismissed.

u. The Twenty-First Cause of Action Fails to State a Claim for Actual and/or Constructive Easement

While it does not appear that California recognizes a claim for actual and/or constructive easement, it does recognize a claim for prescriptive easement. In order for someone to prove he has a prescriptive easement, he must prove, by clear and convincing evidence, that: (1) the alleged easement area was used in a manner which was adverse and hostile to the owner of the property; (2) the use of the alleged easement area was continuous and uninterrupted for more than five years; and (3) the owner of the property had actual notice of the adverse use, or the adverse use was so open, unequivocal, obvious, and notorious that owner must have known about it. [Code Civ. Proc. § 321; Civ. Code § 1007; *Sufficool v. Duncan* (1960) 187 Cal.App.2d 544, 549; *Lindsay v. King* (1956) 138 Cal.App.2d 333, 335-336; *Gilardi v. Hallam* (1981) 30 Cal.3d 317, 321-322; *Nelson v. Robinson* (1941) 47 Cal.App.2d 520, 526; *Hahn v. Curtis* (1946) 73 Cal.App.2d 382, 389; *Shelton v. Malette* (1956) 144 Cal.App.2d 370, 376; *Kraemer v. Kraemer* (1959) 167 Cal.App.2d 291, 306; Miller & Starr, California Real Estate (3rd ed.) § 15:38, p. 15-144.]

Plaintiff-Debtor has failed state any facts to support this claim. His cause of action for actual and/or constructive easement is limited to a request that the Court grant him such an easement. However, he fails to state any facts to support that he has any claim for any kind of easement. Therefore, his claim for actual and/or constructive easement fails as a matter of law.

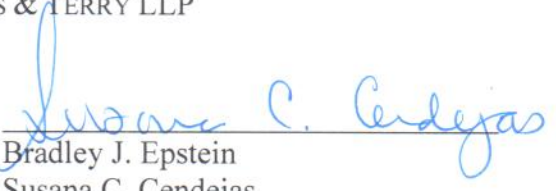
IV. CONCLUSION

Since Plaintiff-debtor's complaint does not satisfy the requirements of an adverse proceeding and he has failed to state any claim upon which relief can be granted, the Association respectfully requests that Plaintiff-Debtor's complaint be dismissed.

Dated: May 17, 2013

ANGIUS & TERRY LLP

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UNITED STATES BANKRUPTCY COURT
 EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO

IN RE DANIEL MAJOR EDSTROM

Debtor,

DANIEL MAJOR EDSTROM

Plaintiff,

v.

AUBURN LAKE TRAILS PROPERTY
 OWNERS ASSOCIATION, a California non-
 profit mutual benefit corporation; et al.

Defendants.

Case No.: 12-29353-B-11

Chapter 11

Adv. Proc. No.: 13-02132-B

Docket Control No. ATL-1

PROOF OF SERVICE BY MAIL

Hearing date: July 23, 2013

Time: 9:32 a.m.

Courtroom: 32

Department: B

Hon. Thomas C. Holman

I am employed in the County of Sacramento; my business address is 3001 Lava Ridge Ct., Suite 130, Roseville, CA 95661. I am over the age of eighteen years and not a party to the foregoing action.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service that same day in the ordinary course of business.

On the date set forth below, I served the following:

**NOTICE OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM, OR IN
 THE ALTERNATIVE FOR A MORE DEFINITE STATEMENT**

&

**MEMORANDUM OF POINTS & AUTHORITITES IN SUPPORT OF DEFENDANT
 AUBURN LAKE RAILS PROPERTY OWNERS ASSOICATION'S MOTION TO**

PROOF OF SERVICE BY MAIL

DISMISS FOR FAILURE TO STATE A CLAIM, OR IN THE ALTERNATIVE FOR A MORE DEFINITE STATEMENT

☒ **by US Mail** on the following party(ies) in said action, in accordance with Code of Civil Procedure § 1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth, below. The mail placed in that designated area is given the correct amount of postage and deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Sacramento, California upon the following:

DANIEL MAJOR EDSTROM
2690 Brown Bear Court
Cool, CA 95614

☐ **by electronic service** based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the document(s) to be sent to the persons at the electronic notification address listed in the service list. I did not receive within a reasonable time after the transmission, any electronic message or other indication that the transmission was not successful.

☐ **by personally delivering** a true copy thereof, in accordance with Code of Civil Procedure § 1011, to the person(s) and at the address(es) set forth below.

☐ **by overnight delivery** on the following party(ies) in said action, in accordance with Code Civil Procedure § 1013 (c), by placing a true copy thereof enclosed in a sealed envelope, with deliver fees paid or provided for, and delivering that envelope to an overnight express service carrier as defined in Code of Civil Procedure § 1013 (c).

☐ **by facsimile transmission**, accordance with Code Civil Procedure § 1013 (c), to the following party(ies) at the facsimile number(s) indicated upon:

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this document was executed on May 17, 2013.


Teresa Baird Gordon, R.P.